No. 4201

United States

Circuit Court of Appeals

For the Ninth Circuit

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NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

A. LEVY and J. ZENTNER COMPANY, a corporation, *Defendant in Error,*

and

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

A. W. KNOX, *Defendant in Error,*

and

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiffs in Error,*

vs.

JOSEPH MOYSE and A. P. JACOBS, Copartners doing business under the firm name and style of JACOBS, MALCOLM & BURTT, *Defendants in Error.*

Opening Brief for Plaintiffs in Error.

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OPENING BRIEF FOR PLAINTIFFS IN ERROR

Statement of the Case.

Three separate complaints were filed by defendants in error against plaintiffs in error in the Southern Division of the District Court of the United States

for the Northern District of California, Second Division, to recover the difference between the rates applicable from Kennewick, Washington, to certain stations in California, and the rates assessed upon certain shipments of potatoes from certain points claimed to be intermediate between Kennewick and the same points of destination. Some shipments moved from branch line points, as hereinafter stated. Each complaint was based upon the theory that the rates from the intermediate points should and could not exceed the rates from Kennewick, because no application had been made to the Interstate Commerce Commission for relief from the provisions of the long and short haul clause of the Fourth Section of the Interstate Commerce Act. There was no allegation, and no effort to prove, that any of the plaintiffs or their assignors had sustained any damage by reason of the assessment of the higher rates from the intermediate points. It was the theory of the plaintiffs that, in the absence of such relief from the provisions of the Fourth Section, they were entitled as a matter of law to the difference between the lower rates from Kennewick and the higher rates from the intermediate points.

As to the branch line points, it was the theory of the plaintiff that the rate from Kennewick should be held as maximum at the junctions of the branch lines with the main lines, adding to such maximum rate the local rate from the branch line point to the junction, and that the complainants were entitled to

the difference between the sum of those two rates and the rate from Kennewick.

It was the position of the defendants in the court below—

First, that allegation and proof of damage are essential to recovery, even though the court had jurisdiction of the subject of the action;

Second, that the court had no jurisdiction of the subject of the action, and that such jurisdiction was vested solely in the Interstate Commerce Commission;

Third, that any existing Fourth Section departures were fully protected by applications filed with, and orders issued by, the Interstate Commerce Commission;

Fourth, that branch line points did not come within the inhibition of the provisions of the Fourth Section.

The *Levy & Zentner Company* case above referred to was numbered 16741 in the court below; the *Knox* case was numbered 16746, and the *Moyse* case numbered 16694.

There was a fourth case brought by Moyse and Jacobs which was numbered 16693, but judgment in that case was rendered *against* the plaintiffs be-

cause of the bar of the statute of limitations under the decision of the Supreme Court of the United States in *Kansas City Southern R. Co. v. Wolf,* 261 U. S. 133. The plaintiffs in No. 16693 have accepted the decision, no appeal having been taken.

All four cases were consolidated for trial in the court below and Nos. 16741, 16746 and 16694 have, by stipulation and order of court, been consolidated in one record before this Court.

The decision of the lower court (pages 26 to 30 of the transcript of the record), is to the effect,

First, that the departures from the Fourth Section were not protected by applications filed with, or orders issued by the Interstate Commerce Commission;

Second, That the complainants were not bound to first seek relief from the Commission;

Third, That in so far as the points on spur lines are concerned, "for all substantial and practical rate-making purposes they are on the 'same line or route in the same direction' as Kennewick, and a distance 'shorter being included within the longer distance,' within the intent and meaning of Sec. 4 of the Act;"

Fourth, That complainants made out a prima facie case of damage by proving that a lower rate was in

existence from the farther distant point, the language of the trial judge's decision being as follows:

> "That plaintiffs have been damaged and at least to the extent of the excess of the charges over the Kennewick charge, is settled by *Davis v. Parrington, supra,* (281 Fed. 14). However defendants violate the statute by tariffs filed and published, it will be presumed that in the lesser charge for the long haul they have at least reasonable compensation; and hence, obviously the greater charge for the short haul is unreasonable and damaging to the extent of the excess at the very least. This affords a rule valid and sound in principle, shifting to defendants the burden of evidence to rebut and lessen this *prima facie* proof of damage."

In the *Levy & Zentner Company case,* No. 16741, the judgment was for $3,855.95, together with $600 attorney's fees, and costs; in 16746 the judgment was for $8,078.95, together with $1100 attorney's fees, and costs; and in 16694 the judgment was for $2,-696.32, together with $500 attorney's fees, and for costs of $25.

More specifically stated, the allegations of the complaints in the three cases above mentioned are as follows:

Levy & Zentner Company v. Northern Pacific Railway Company, No. 16741: The complaint in this case was filed June 17, 1922, by A. Levy and J. Zentner Company, a corporation, as plaintiff,

against the Northern Pacific Railway Company and the Southern Pacific Company. It is alleged that between October 26, 1921, and March 11, 1922, the plaintiff shipped 68 carloads of potatoes from Harrah, Wapato, Toppenish, Sunnyside and Outlook, Washington, to San Francisco, Modesto, Stockton, San Jose, Porterville and Merced, California, upon which the rates charged were in excess of those from Kennewick, a more distant station, to said points of delivery.

Joseph Moyse, etc., v. Northern Pacific Railway Company, et al, No. 16694: The plaintiffs in this case were Joseph Moyse and A. P. Jacobs, copartners doing business under the firm name and style of Jacobs, Malcolm & Burtt. The defendants were the Northern Pacific Railway Company and the Southern Pacific Company. It is alleged that between January 14th and December 12th, 1917, and between March 26, 1920, and February 1, 1922, the plaintiffs and their assignor shipped 51 carloads of potatoes from Yethanot, Moxee, Wapato, Toppenish, Mabton, Yakima, Sunnyside, Nass, Satus, Farron, Outlook, Zillah, Harrah, Ashue and Cowiche, all in the State of Washington, to San Francisco, Oakland, Stockton and San Jose, in the State of California, the points of origin being on the line of the Northern Pacific, and those of destination on the line of the Southern Pacific. It is stated that the rates collected for the transportation of these shipments exceeded the rate from Kennewick, Washington, to

the point of destination, Kennewick being further distant from the points of destination than said points of origin. The shipments during 1917, it is alleged, were made by Jacobs, Malcolm & Burtt, a corporation, which paid the charges, and those made during 1920, 1921 and 1922 were made by the copartnership of Jacobs, Malcolm & Burtt. An assignment of the claim from the corporation to the copartnership is also set forth.

Knox v. Northern Pacific Railway Company, No. 16746: The complaint in this case was filed June 30, 1922. This action is brought by A. W. Knox, plaintiff, as assignee of the shippers hereinafter mentioned, against the Northern Pacific Railway Company and the Southern Pacific Company. The complaint contains four separate causes of action. In the first cause of action it is alleged that between March 10, 1920, and March 19, 1922, Walter A. Perry Company, a copartnership, shipped 97 carloads of potatoes from Grandview, Toppenish, Outlook, Mabton, Nass, Sunnyside, Parker, Midvale, Phillips, Wapato, Ashue, Satus, Harrah, Cowiche, Yakima and Selah, in the State of Washington, to Sacramento, Stockton, Oroville, Woodland, Yuba, Lodi, Colusa, Chico, Modesto, Suisun, Roseville, Willows, Turlock, Martinez, Oakland and San Francisco, in the State of California. The rates charged, it is alleged, exceeded those from Kennewick, a more distant point. The amount demanded in this cause of action is $5,150.16. In the second cause of action

it is alleged that between January 10, 1921, and November 3, 1921, John Demartini Company, a corporation, shipped five carloads of potatoes from Toppenish and Sunnyside, Washington, to Sacramento, Stockton and San Francisco, California, the rates upon which exceeded those from Kennewick, a more distant point. The amount claimed here is $258.02. In the third cause of action plaintiff alleges that between November 2, 1921, and February 24, 1922, L. Scatena & Company—A. Galli Fruit Company, Consolidated, (a corporation), shipped fourteen carloads of potatoes from Ashue, Toppenish, Wapato and Grandview, Washington, to San Francisco and Oakland, California, upon which the rates charged were in excess of those from Kennewick, a more distant point. The amount claimed upon these shipments is $829.91. By the fourth cause of action it is alleged that between November 14, 1920, and November 22, 1921, F. M. Burnham shipped seventeen carloads of potatoes from Outlook, Sunnyside and Selah, Washington, to San Francisco, California, upon which the rates charged were in excess of those from Kennewick, a more distant point. The amount claimed in this cause of action is $917.04. The total amount for which judgment is demanded in this action is $7,155.15, with interest and costs, and counsel fees in the sum of $2,000.00. In each of these causes of action plaintiff states that the claim of each shipper was assigned to him.

In each of these actions the complaint stated that at the time of the movement of the shipments in question a lower rate obtained upon potatoes from Kennewick, Washington, to points of destination in California, than the rates which were charged upon the shipments that actually moved, and it is also stated that the stations of origin were all intermediate between Kennewick and the points of destination; that it is a longer distance from Kennewick to the points of destination than it is from the intermediate stations to such destinations, the shorter being included within the longer distance.

Summary of the Issues

From the foregoing statement, it appears that the issues involved are as follows:

1. That defendants in error cannot recover because they neither alleged nor proved damage.

2. That the court had no jurisdiction of any of these actions because:

(a) Prior to the commencement of these actions, no application was made to the Interstate Commerce Commission for the reparation claimed;

(b) Exclusive jurisdiction to primarily hear these claims and award damages, is vested in the Interstate Commerce Commission.

3. That the alleged violations of the Fourth Section of the Interstate Commerce Act have been protected, and the carriers relieved therefrom, by prop-

er applications filed with the Interstate Commerce Commission.

4. That the points of origin situated on branch lines of the Northern Pacific Railway, are not intermediate points within the meaning of the Fourth Section of the Interstate Commerce Act.

ARGUMENT

1. These Cases are Clearly Ruled by Davis, Presidential Agent, v. The Portland Seed Co., (and Three Cognate Cases) Decided by the Supreme Court, April 7, 1924, in Which That Court Reversed the Decision of this Court Which Was Relied on by Judge Bourquin in the Instant Cases. Reversal is Required Because in the Cases Now Under Consideration None of the Plaintiffs Pleaded Or Proved Pecuniary Injury Or Damage.

We confidently believe that the plaintiffs in error would not have been put to the necessity of resorting to this court for relief if the Supreme Court had handed down its decision in *Davis, Presidential Agent v. The Portland Seed Company* and the three other related cases which were decided on April 7, 1924, a copy of the opinion in which is printed at the end of this brief as Exhibit No. 4, before Judge Bourquin on May 30, 1923 (Record, pp. 26-30) ordered judgment for the plaintiffs below.

As the record stood when Judge Bourquin decided the three cases now here on writs of error he found that the carriers had charged for interstate

movements of freight more for the lesser than for the greater distance over the same line or route in the same direction without obtaining relieving orders from the Interstate Commerce Commission. That they had such relieving orders is asserted by us on these writs of error and discussed under Subdivision 3 of this argument. But Judge Bourquin, finding that there were no such orders, or that if such attempt had been made it was ineffectual, held (Record, p. 28):

> "The plaintiffs are entitled to recover same in so far as barred by the limitations of the Act, viz., to recover upon all items of shipments made within two years prior to complaints filed herein. They were not bound to first seek relief from the Commission, but could as they did proceed to assert their right herein.

See Davis v. Parrington, 281 Fed. 14."

He further held (Record, p. 30):

> "That plaintiffs have been damaged and at least to the extent of the excess of the charges over the Kennewick charge, is settled by Davis *v.* Parrington, supra.
>
> "However defendants violate the statute by tariffs filed and published, it will be presumed that in the lesser charge for the long haul they have at least reasonable compensation; and hence, obviously the greater charge for the short haul is unreasonable and damaging to the extent of the excess at the very least.

> "This affords a rule valid and sound in principle, shifting to defendants the burden of evidence to rebut and lessen this prima facie proof of damage."

In the decision by this court in *Davis v. Parrington,* June 5, 1922 (281 Fed. 10) there were also considered the suits, on the law side of the court, of *San Francisco & Portland Steamship Co. v. Parrington* and *Davis, as Agent, v. The Portland Seed Company,* and this court held that:

> "Inasmuch as no permission from the Interstate Commerce Commission was obtained by the carriers concerned in the present cases, the greater charge to the shorter point was prohibited by the statute referred to. It was an illegal rate, unless the effect of failing to obtain the consent of the Commission can be avoided by regarding the question as purely administrative, to be submitted first to the Interstate Commerce Commission before appeal lies to the judicial power."

After discussing the question of whether the violations of the long and short haul clause were permitted by order of the Commission or by the operation of orders of the Director General, this court, as fairly summarized by paragraph 9 of the syllabus, holds:

> "In actions by shippers to recover excessive freight rates collected in violation of the long and short haul clause of Interstate Commerce Act, Sec. 4 (Comp. St. Sec. 8566) it was proper

> to measure the damages by the difference between the rate collected for the shorter haul and the tariff rate for the longer haul."

Therefore it is evident that the learned District Judge felt constrained to follow the unanimous opinion of this court and to adopt the same rule for measuring damage in the instant cases.

But the defendant in The Portland Seed Company case was allowed certiorari by this court and the defendants in the other two cases sued out writs of error to the Supreme Court and also the Great Northern Railway Company, against which a similar suit had been decided by the Supreme Court of Minnesota, obtained certiorari from the Supreme Court, and those four cases, as we have shown, were decided by that court on April 7th, 1924, by the opinion, a copy of which is attached hereto as Exhibit 4.

In reversing the judgments the Supreme Court has clearly held that the rates charged and collected, if they were rates evidenced by tariffs, were the rates which should have been collected notwithstanding that another tariff provided a lesser rate from or to a more distant point over the same line or route in the same direction, and notwithstanding the fact that the railroad carrier had not obtained permission from the Interstate Commerce Commission under the amended 4th Section to charge more for the lesser distance.

And it is further most clearly held that "mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either."

The shipper's argument that under the long and short haul clause the lower published rate from the more distant point became the maximum which the carrier could charge for the shipment from the intermediate point notwithstanding the higher published rate therefor, and that the difference amounted to an illegal exaction recoverable without other proof of actual damage and without regard to the intrinsic reasonableness of either rate, was found by the Supreme Court to be without merit.

Now applying the reasoning of the Supreme Court opinion of April 7, 1924, to the instant cases we find from the testimony of F. W. Gomph, beginning at page 72 of the record, and that of M. A. Cummings, beginning at page 80 of the record, that the rates actually charged and collected were rates which were tariff rates on file for the service performed, even though there may have been and doubtless were lesser rates from the more distant point over the same line or route in the same direction.

We further find that the three complaints in the instant cases are all barren of any allegation that the plaintiff or the plaintiff's assignor suffered any pecuniary injury or damage by the exactions complained of. Each of the three complaints is based on the theory of a recovery of a straight overcharge.

There were but two witnesses for the plaintiffs, Mr. A. J. Harwood, plaintiff's counsel, whose testimony begins at page 59 of the record, and Mr. A. W. Knox, whose testimony begins at page 88 of the record. Neither of these witnesses attempted to show that the plaintiffs or the plaintiffs' assignors had suffered any pecuniary loss or had been damaged to the extent of the difference between the higher and the lower rate, or to any other extent. Nor were there any stipulations on that subject. On this branch of the case it is therefore respectfully submitted that plaintiffs in error are entitled to a reversal.

2. The Court Has No Jurisdiction of These Actions.

(*a*) *The Nature of the Action.*

The claims of defendants in error are based upon a violation of Section 4 of the Interstate Commerce Act. As it existed from the amendment of June 18, 1910, until February 28, 1920, when it was again amended by the Transportation Act, 1920, this Section read as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance; *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this saction; *Provided, further,* That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

By the amendment of February 28, 1920, this section provided:

> "(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges

to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul or the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission."

Section 9 of the Interstate Commerce Act authorizes an action to be brought by any person claiming to be damaged because of a violation of the Interstate Commerce Act. This Section, so far as material, provides as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which

one of the two methods of procedure herein provided for he or they will adopt."

(*b*) *Where the Determination of an Administrative Question is Involved Recourse Must First Be Had to the Interstate Commerce Commission.*

Although Section 9 in general terms permits a plaintiff at his election to institute proceedings before either the Commission or the courts for the recovery of damages, nevertheless this right is subject to an important limitation. Wherever the nature of the claim is such that it requires the exercise of the Commission's administrative functions, then a claimant must first apply to the Commission before instituting an action in the courts. Thus, if it is contended that a rate specified in a tariff duly filed with the Commission is unreasonably high, resulting in damage to the claimant, it is necessary that he have the question of the reasonableness of the rate determined in the first instance by the Commission, and should that tribunal find that the rates were unreasonable and award reparation, then, and not until then, may the claimant apply to the courts. This is so in order to uphold the integrity of the tariffs and to secure uniformity of treatment to all shippers. Were the rule otherwise, the reasonableness of rates, under Section 1 of the Interstate Commerce Act, would be a matter to be determined by innumerable juries or courts throughout the country and the varying conclusions upon the same

state of facts would unquestionably result in discrimination and undue prejudice to the shippers at large.

> *Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426.

And the same rule has been applied in cases involving questions of discrimination alleged to be in violation of the Interstate Commerce Act.

> *Robinson v. B. & O. R. R. Co.,* 222 U. S. 506.

Indeed, the same court has gone so far as to hold that where the construction of a tariff involves the question whether or not it is applicable to certain commodities, this question of fact should first be determined by the Commission before an action can be brought in the courts.

The Court said:

> "There is no room for controversy that the law required a tariff and, therefore, if there was no tariff on crossties, the making and filing of such a tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the Statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the

> purpose of the Act to Regulate Commerce to secure, the courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Commission." (Citing cases).
>
> *Texas & Pacific Railway v. American Tie Co.,* 234 U. S. 138, 146.

In a later case, there was involved the right of a shipper to recover from a carrier the amount expended for the construction of inside doors or bulkheads necessary to properly protect carload shipments of grain. The shipper sued in the State Court, claiming that the carrier had failed to perform its common law duty to furnish adequate cars. No provision was made in the tariff for the payment of such an allowance. In holding that as to interstate shipments the shipper must in the first instance apply to the Commission, the court pointed out that in order to decide this controversy it would be required to investigate many intricate facts of transportation with their consequent effect upon the tariffs, and it decided that this case concerned a rate making problem, administrative in its nature, which, in order to secure uniformity and prevent discrimination, should first be determined by the Interstate Commerce Commission before being submitted to a court.

> *Loomis v. Lehigh Valley R. R. Co.,* 240 U. S. 43.

That an administrative question is involved in the instant cases, we submit can not well be questioned. Here, it appears that applications have been filed for relief from the operation of the Fourth Section, and that the rates have long been published in reliance upon such applications. In order to determine whether the carriers were warranted in so doing, it is necessary to consider the scope of the applications, the reasons which impelled the carriers to seek relief from the provisions of the Fourth Section, such as water or carrier competition, and also the volume or level of the rates, that is to say, whether they are reasonable at the intermediate points, or otherwise. All of these questions are peculiarly administrative in their character and should, therefore, be considered alone by the Commission, and do not fall within the province of the courts to determine.

That the court has no jurisdiction of these actions is, we believe, conclusively established by the decision of the Supreme Court of the United States in the cases Nos. 114, 122, 123 and 209, under date of April 7, 1924, hereinbefore referred to. The title of the first of those four cases is *James C. Davis, as Agent, etc., petitioner, v. The Portland Seed Company,* No. 114, on writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. That case definitely holds that the exaction of a higher rate from the intermediate point than that applicable to the further distant point does not con-

stitute "an overcharge illegally exacted and recoverable as money had and received and that a condition prerequisite to recovery is proof of actual damage."

The Supreme Court in The Portland Seed Company opinion just referred to repudiates the contention of claimants' attorneys in the four cases decided by that opinion, "That the sum charged above the Pecos rate (*the rate from the more distant point*) amounted to an illegal exaction recoverable without other proof of actual damage or without regard to the intrinsic reasonableness of either rate."

It is our position that there can be no proof of actual damage without a finding as to the intrinsic reasonableness of the rate from the intermediate point, or that there has been undue discrimination against the intermediate point by the exaction of a higher rate therefrom than applied to the further distant point. If this be true the court has no jurisdiction to award reparation, because it has no power to determine the reasonableness of the rate from the intermediate point actually collected, nor has it any power to determine whether or not there was any undue discrimination in the charging of a higher rate from the intermediate point than applied from the further distant point.

That the court has no power to determine the reasonableness of the rate from the intermediate point

or to pass upon the question of discrimination, is settled by a long line of decisions of the Supreme Court of the United States, among which are the following:

Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 440;
B. & O. R. R. Co. v. U. S., 215 U. S. 481, 493-4;
Robinson v. B. & O. R. R. Co., 222 U. S. 506, 509-10;
Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247, 255;
Minnesota Rate cases, 230 U. S. 352-419;
Morrisdale Coal Co. v. Pennsylvania R. R. Co., 230 U. S. 304, 313;
T. & P. R. R. Co. v. American Tie & Timber Co., 234 U. S. 138; 313;
A. T. & S. F. Ry. Co. v. U. S., 232 U. S., 199, 220;
Pennsylvania R. R. Co. v. Puritan, 237 U. S. 121, 131;
Pennsylvania R. R. Co. v. Clark, 238 U. S., 456-69;
Loomis v. Lehigh Valley R. R. Co., 240 U. S., 43, 48-9.

Indeed, in the instant cases there is no allegation in any of the complaints that the rates from the intermediate points or from the points on branch lines were unreasonable or that the charging of a lower rate from the further distant point constituted any discrimination. In short, there is no allegation

of any violation of either Section 1 or Section 3 of the Interstate Commerce Act, or any violation of any provision of the Interstate Commerce Act excepting allegations of a departure from the provisions of Section 4 thereof, so that there was nothing before the court upon which it could properly predicate an award of reparation or judgment of damages in favor of any of the plaintiffs.

3. Any Existing Fourth Section Departures Were Fully Protected by Applications Filed With the Interstate Commerce Commission.

(Note: Figures appearing in parentheses refer to pages of the printed transcript of record in the Circuit Court of Appeals).

(*a*) *Location of points involved.*

By stipulation and order (record pp. 269-270), the original exhibits attached to the bill of exceptions herein were omitted from the printed transcript of record, but such original exhibits were transmitted to the Circuit Court of Appeals. As will be seen from the map introduced (Defendants' Exhibit M), Kennewick and Pasco are situated on the line of the Northern Pacific on opposite sides of the river about 2.7 miles apart (94). As to the shipments involved, the points of origin are situated on the line of the Northern Pacific west of Kennewick. This line runs to Portland and thence the shipments moved over the Southern Pacific to points of destination. It will also appear from this map that the railroad

of the Oregon-Washington Railroad & Navigation Company is the short line from Pasco and Kennewick to Portland.

The station of Moxee is a branch line point nine miles from the main line (58). Yethanot, Farron, Harrah, Ashue and Cowiche are also on branch lines. Yethanot is 2.2 miles from the main line, Farron 8.1 miles, Harrah, 9.5 miles, Ashue 5.2 miles, Cowiche 9.2 miles and Midvale 3 miles from the main line. These points (except Midvale), are on branch lines of the Northern Pacific, all making into the main line south of Kennewick (63). Midvale is on the O.-W. R. R. & N. Railroad, and not on the Northern Pacific.

The distance from Kennewick to North Yakima and Yakima is 87 miles and from Kennewick to Wesley Junction 67 miles (94). The distances from Kennewick, Pasco and the various intermediate points of origin to Portland over the Northern Pacific line and also that from Kennewick to Portland over the O.-W. R. R. & N. Co., the short line, appear in Defendants' Exhibit N. The points of destination are all on the line of the Southern Pacific Company in California.

A map completely depicting the situation was received in evidence as Exhibit 3 and is attached to this brief as Exhibit 1.

(*b*) *The rate situation.*

Copies of the material parts of the defendants' tariffs were introduced to show the rate situation as it existed in 1910 and 1911 when the original applications for relief from the Fourth Section were filed. Testimony was introduced for the purpose of pointing out to the court the method by which these rates were constructed. We shall first deal with the rates from Pasco and Kennewick to Portland and thence to San Francisco. The rates between San Francisco and Portland applicable in connection with shipments of potatoes originating at Kennewick at that time, and later Pasco, are shown in Exhibit F, being Pacific Freight Tariff Bureau Tariff No. 1-A, I. C. C. 62, effective January 15, 1911. Page 47 of this tariff shows in Item 200 that the Class C rate of 16c per 100 pounds applies between Portland and San Francisco upon traffic originating at certain points, including Group 9, on the Northern Pacific. Turning to page 8 of this tariff it will be found that Group 9 includes Pasco, Washington, among other points. From this it appears that the rate of 16c between San Francisco and Portland applies only upon traffic originating at or destined to Pasco.

Page 27, Item 28 of this tariff, in the second clause shows that this 16 cent rate applies at intermediate points not named south of Marysville or Woodland, California, which in this case include the points of destination. By referring to page 46 of this tariff,

we will find the method of arriving at the rates from Portland to Pasco, which are to be added to the San Francisco-Portland rates. The tariff referred to is Northern Pacific Tariff No. 1323-A, I. C. C. No. 4383, introduced in this proceeding as Exhibit J.

On page 13 of the latter tariff will be found among other points, the rates from Kennewick and Pasco to Group 1 points, the same being 14 cents per 100 pounds. These two points of origin are numbered 351 and 352 in the left hand margin. The Kennewick rate is shown as 14 cents, but no rate is shown from Pasco as this item is blank in the column of Group 1 rates. But, under the intermediate application of the tariff found on page 10, Rule 1, the 14 cent rate applies. According to this rule the 14 cent rate applicable at more distant points applies also at Pasco.

Page 6 of this tariff includes in Group 1 the station of Portland which thus indicates that the rates shown from the points on page 13 to Group 1 points apply to Portland. In the extreme right hand column on page 13 appear certain figures which refer to the routes over which these rates apply. Page 21 shows that routes Numbers 1 and 2 comprise the Northern Pacific Railway alone. Therefore, the rates from Kennewick and Pasco, together with the other intermediate points of destination also shown on page 13 apply to Portland over the line of the Northern Pacific.

The combination of the two rates from Pasco and Kennewick to Portland of 14 cents, and from Portland to San Francisco of 16 cents, makes a total rate of 30 cents upon this traffic.

Exhibit J also shows that the rates to Portland from the intermediate points of origin involved in this case are the same as those from Kennewick and Pasco, namely 14 cents per 100 pounds.

According to Exhibit K (S. P. Tariff No. 302, I. C. C. 3270) the rate on potatoes between San Francisco and other California points and Portland is 25 cents per 100 pounds. This will appear on page 23 of this tariff. This rate, it will be noted, is not restricted to cases where traffic originates at or is destined to certain points in Washington, or elsewhere, such as Pasco and Kennewick, as was the case with respect to the 16 cent rate found in Exhibit F. Thus it appears that the through rate from the intermediate points of origin to San Francisco is 39 cents, being made up of a combination of the 14 cent rate to Portland and the 25 cent rate beyond Portland. This exceeds by 9 cents the Pasco combination rate of 30 cents, thus showing that the rate from the intermediate points is higher than the rate from more distant points. In both cases the rates from the points of origin to Portland are the same; the difference occurs in the rates between Portland and San Francisco. Upon the Pasco traffic this is a proportional Class C rate of 16 cents (Exhibit F,

page 47); from the intermediate points traffic moves under a commodity rate of 25 cents (Exhibit K, page 23).

Exhibit G, Supplement 2, P. F. T. B. Tariff No. 1-A, I. C. C. No. 62, effective May 17, 1911, shows that the Pasco rate was extended to Kennewick. This appears at the top of page 2 where Group 9 was changed so as to include Kennewick as well as Pasco and also in the next item this change appears. Since Kennewick is west of Pasco, this would necessarily include Pasco as well because, according to this item, all the points between Kennewick, Washington, and certain points east thereof, viz., Hauser and Larson, Idaho, take rates lower than those from the points of origin involved herein, which are west of Kennewick. This was explained by Mr. Gomph (81).

It was conceded by defendants in error that from the branch line points the rates should include the local rate from the branch line point to the junction point with the main line, which should be added to the rate from the junction point to the point of destination (91, 92). It was also stipulated that the tariffs to which we have referred were filed with the Interstate Commerce Commission (86, 87).

Mr. Cummings testified as to the increase of 25% in the rates which took place upon June 1st, 1918, under the Director General of Railroads' General

Order No. 28 (87, 88), a copy of which was introduced as Defendant's Exhibit L (96). He also described the increase of 25% which took place on Aug. 26, 1920, pursuant to the Interstate Commerce Commission's decision in *Ex Parte* 74, 58 I. C. C. Rep. 220 (88). On January 1, 1922, the rates were reduced 10 per cent (88).

(*c*) *Application for Relief from the Fourth Section.*

After the amendment of June 18, 1910, to the Fourth Section, the Interstate Commerce Commission on October 14, 1910, promulgated an order relative to the filing of applications for relief, specifying, among other things, the form in which they should be made; a copy of this was introduced as Defendant's Exhibit A (75). It will be noted that pursuant to this order the carriers had until February 17, 1911, within which to file their applications. On February 11, 1911, Mr. Gomph, as Agent for the Southern Pacific and the Northern Pacific (his authority was admitted—Tr. 79) filed an application for relief from the provisions of the Fourth Section with respect to the rates between San Francisco and other California points and Pasco, Washington, and to publish rates at Pasco lower than the rates from intermediate points on the Northern Pacific. This was introduced in evidence as defendant's Exhibit B (76), and is attached to this brief as Exhibit 2.

On December 10, 1910, Mr. Gomph, on behalf of these carriers, filed with the Interstate Commerce Commission, an omnibus application for relief from the Fourth Section, which was introduced as Defendant's Exhibit C (77); accompanying this was P. F. T. B. Tariff No. 1, I. C. C. No. 2, which was referred to in the application, and which was introduced as defendant's Exhibit D (77).

On December 10, 1910, Mr. Gomph also filed, on behalf of these carriers another omnibus application which was received in evidence as defendant's Exhibit E; and with it was received, as Exhibit F, P. F. T. B. Tariff No. 1-A, I. C. C. No. 62, which was referred to in the application (77).

The Pasco rate was extended to Kennewick by Supplement No. 2 to P. F. T. B. Tariff No. 1-A, I. C. C. 62, which was received in evidence as defendants Exhibit F (77). Mr. Gomph testified that this was done because the Oregon-Washington Railroad and Navigation Company, which is the short line to Portland, in February 1911, extended its line through Kennewick to North Yakima thereby increasing the competition (77, 78).

On February 3, 1914, the Interstate Commerce Commission promulgated Fourth Section Order No. 3700, a copy of which was introduced in evidence as defendant's Exhibit H (79). Supplement 1 to Fourth Section Order No. 3700, dated June 2, 1920,

was introduced as defendant's Exhibit I (79). This does not modify the original order in any respect material to this case. A copy of Fourth Section Order No. 3700 is attached to this brief as Exhibit 3.

Section 8 of this order reads:

> "Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended."

Section 5 also is material. It provides:

> "A longer line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the Fourth Section of the Act, under the following circumstances:
>
> (a) Where the longer line is meeting a reduction in rates initiated by the shorter line.
>
> (b) Where the longer line has not at any time heretofore met the rates of the shorter line.

(*d*) *The Applications For Relief From the Provisions of the Fourth Section of the Interstate Commerce Act Were Sufficient in Form to Protect Plaintiffs in Error Pending a Decision Thereon by the Interstate Commerce Commission.*

It is conceded that none of the applications for relief from the Fourth Section, admitted in evidence, has been acted upon by the Interstate Commerce Commission (56). But it is contended that the so-called omnibus applications (Exhibits C and E) were too general in form to protect the carriers.

The Fourth Section of the Interstate Commerce Act as it existed prior to the amendment of 1920 provided in part:

> "That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

The amendment of February 28th, 1920, to this Section, provided in part—

> "*And Provided Further,* that rates, fares or charges existing at the time of the passage of this amendatory act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this Section until the further order of or a determination by the Commission."

In considering this Section, it is to be noted that the Commission's *order* authorizing a departure from the long and short haul rule deals with special cases, but nothing is said about the scope of the application, whether it shall be general or in the most detailed form. The section does not prohibit a general application. What the Commission is required to do is to investigate the matter and then issue an order setting forth specifically to what extent the carriers shall be permitted to deviate from the long-and-short-haul rule. Under the construction contended for by counsel, both the application and the order must deal with point to point rates. But, in acting under this section, the Commission has dealt with rate adjustments quite broad in their scope including the rates between all of the points in vast regions of territory. The Interstate Commerce Commission's reports are full of cases where such adjustments have been made. It would appear, therefore, that the term "special cases" as used in the

act contemplates the investigation of a specific situation, whether it includes one or thousands of rates; that it was the purpose of Congress to require the Commission to investigate all of the rates under consideration and not to deal with the situation by orders affecting the country at large, not based upon an investigation of the rate adjustment in question. That there should be an *investigation* by the Commission was the primary requirement of the Statute; the form of the application was not considered important. Congress laid down a general rule for the whole country; the Commission was to administer that rule and to relax the prohibition against violations of the long and short haul rule where the situation, whether involving an individual rate or many rates, would justify such action.

Counsel will no doubt refer to the case of *United States v. Merchants etc., Association,* 242 U. S. 178 as establishing the rule that general applications such as this were not permitted by the law. It was there said at page 187 that the clause in the Fourth Section with respect to the granting of relief in special cases was designed to guard against the Commission issuing general orders suspending the long and short haul clause and to insure action by it separately in respect to particular carriers and only after consideration of the special circumstances existing. This statement was hardly necessary to a decision of the case, which involved the question whether the orders of the Commission granting re-

lief from the Fourth Section were void unless there was an application made to the Commission for the specific purpose of obtaining the relief which was in fact granted by the orders. The court held that the Commission was not required to grant or deny *in toto* the precise relief applied for and that the Commission could grant part of the relief sought. It will be noted that in this case the Commission and the court were considering the entire trans-continental rate adjustment involving thousands of points, scattered throughout a wide territory and nothing was there said as to the invalidity of the application because it covered so wide a scope, or was so general in character.

And in the *Intermountain Rate Cases,* 234 U. S. 476, the court was dealing with this trans-continental rate situation where, it will be noted, the applications covering so wide an expanse of territory were not condemned. The court seems to have recognized that such a situation can best be dealt with as a whole and not in piecemeal. We must conclude, therefore, that the application, whether it be broad in its scope or confined to but one or two points, is sufficient if it deals with a special situation which is presented to the Commission for its investigation.

The Commission had occasion to consider this question in the case of *Southern Furniture Manufacturers Association v. Southern Railway Company,* 25 I. C. C. 379.

In speaking of the application pending before it, the Commission, at page 381 of its report said:

> "This application is one of many general or blanket applications filed by the carriers and in form and substance meets the requirements of the Commission's Fourth Section Order of October 14, 1910, in pursuance of which it was filed. Petitioner questions its legality and sufficiency, pointing to the language of the act, i. e.:
>
> > 'That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of persons and property;'
>
> and contending that this is not such an application as is contemplated by the statute. It should be noted, however, that there is nothing in this Section of the Act prescribing the form, contents or breadth of the application to be filed thereunder. We, therefore, hold that this application is sufficient for the purposes for which it was filed."

The Commission has likewise, in its annual reports, referred to the general character of the applications filed for relief from the provisions of the amended Fourth Section and it has at no time condemned this practice.

In its report for the year 1911, at page 20, appears the statement:

> "Previous to February 17, 1911, 5,030 applications for relief under the Fourth Section were filed; since that date 693 additional applications have been made. Many of these applications are exceedingly voluminous and intricate, involving thousands of rates and many different situations. * * *
>
> Under this holding it is the duty of the Commission to investigate every application filed and to determine the issue of fact presented. Each application becomes a formal complaint—in fact, many applications resolve themselves into numerous complaints since one application may present several different issues."

As in its report for 1912, at page 17, the Commission says:

> "Many of the original applications (filed immediately after the amendment of 1910) were very comprehensive in their nature, covering practically all traffic and points in the carrying trade of which the applicants participated."

Again, in its annual report for 1913, at pages 25 and 26, the Commission says:

> "In some instances these applications (for relief under the Fourth Section) have reference only to particular situations, involving peculiar circumstances, while in others they include all rates published in particular tariffs which in any manner contravene the provisions of this

> section. In still other instances, single applications were filed on behalf of the carriers asking relief as to all rates in contravention of this section contained in all tariffs in which they participate."

The Commission then refers to special applications filed by the carriers and continues:

> "These applications have been responded to by special orders, most of which are necessarily temporary in character and automatically expire when the Commission acts upon the general applications *which protect the rates to which the changes are related.*" (Emphasis ours.)

In its annual report for the year 1922 the Commission, at page 48, refers to the fact that out of the 5031 applications filed pursuant to the amendment of 1910, 1767 yet remain undisposed of, which, for the most part, are general in character.

Thus it will be seen that the precise tribunal charged with the administration of this law has, for a period of more than ten years, acted upon applications such as those involved here upon the assumption that they are valid and are sufficient to protect the carrier in the violation of the long and short haul rule until the Commission investigates and finally determines the matter. We believe that great weight should be given to this practical construction of the Act by the Interstate Commerce Commission.

It is said by a well recognized authority:

> "It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution and application, especially where it has long prevailed, while not controlling, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous. The courts are especially reluctant to overturn a long standing executive or departmental construction where great interests have grown up under it and will be disturbed or destroyed by the announcement of a new rule, or where parties who have contracted with the government upon the faith of such construction will be prejudiced."
>
> *25 Rul. Case Law,* p. 1043,
> *36 Cyc.,* 1140.

And in considering a conference ruling of the Interstate Commerce Commission, it was said:

> "Surely the conclusions of the body delegated by Congress to enforce the statute are entitled to great weight in a case like the present. The rulings of administrative bodies charged with the enforcement of certain statutes have very generally been given careful consideration and credit by the courts."
>
> *Chicago G. W. R. Co. v. Postal Tel.-Cable Co.,* 245 Fed. 592, 600.

In construing the Safety Appliance Act, with reference to the necessity of maintaining an automatic

coupler between the engine and the tender, the court said that while the custom of the railroads not to do so could not justify a violation of the statute, nevertheless, "that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute." After referring to the Commission's order, the court held that the use of such a coupling device between the engine and the tender was not required by the law.

> *Pennell v. Phil. & R. Ry.,* 231 U. S. 675, 680.

As we have pointed out, the practical construction of Section 4, given by the Commission, has prevailed for many years, and should not now be overruled.

In addition to the reasons we have urged in support of the omnibus applications, it would seem that the proviso contained in the amendment of 1920, set forth above, protects the carriers. The statute says:

> "That rates * * * existing at the time of the passage of this amendatory act by virtue of orders of the Commission or as to which *application has theretofore been filed with the Commission and not yet acted upon,* shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission." (Emphasis supplied.)

From this, it would appear that it was the intention of Congress that all applications filed before the amendment of February 29, 1920, became effective, were recognized as valid and sufficient to protect the carrier until the Commission eventually passed upon them. It must be assumed that Congress was familiar with the annual reports of the Commission and its decisions respecting the validity of such general applications and that this statute was intended to and did recognize the sufficiency of all applications, whether general or special, theretofore filed with the Commission for relief from the Fourth Section.

The violation existing at Pasco was covered by the application filed February 11, 1911 (Exhibit B). This specifically related to Pasco and there can be no question as to its sufficiency in form.

The Fourth Section specifically provides that a violation covered by an application is valid until passed upon by the Commission, and this has been expressly decided by the Interstate Commerce Commission.

Appalachia Lumber Co. v. L. & N. R. Co., 25 I. C. C. Rep. 193, 197;

City of Clarksdale v. Illinois Central Railroad Company, 45 I. C. C. Rep. 109, 110;

Aetna Explosives Co. v. Director General, 53 I. C. C. Rep. 140;

Schlitz Brewing Co. v. Director General, 55 I. C. C. Rep. 610.

As we have previously stated, the Pasco rate was extended to Kennewick, effective May 17, 1911, pursuant to Supplement No. 2 of Tariff 1-A, introduced here as Exhibit G. This was done primarily to meet the competition of the O.-W. R. & N. Railroad, the short line to Portland, which extended its line through Kennewick to North Yakima (77 to 79). It was defendant's contention that the violation of the long and short haul provision at Kennewick was justified under Fourth Section Order No. 3700 (Exhibit H). Section 5, as we have shown, permits the longer line to reduce its rates to meet those of a shorter line when the existing rates of either line are not in conformity with the Fourth Section, in cases where the longer line is meeting a reduction effected by the shorter line. That was the case here. The Northern Pacific, the long line to Portland, already had Fourth Section relief at Pasco to meet the competition of the O.-W. R. & N. and when the latter extended its line to Kennewick, the Northern Pacific met this competition by reducing the rate at Kennewick to a point lower than that applicable from intermediate points. This was accomplished by extending the Pasco rate to Kennewick.

Section 8 of this order likewise authorizes such an adjustment. This section authorizes the extension of a rate in violation of the Fourth Section to a point in close proximity, provided that higher rates are not maintained between the original point

and the point to which the low rate has been extended (in this case to points between Pasco and Kennewick). Kennewick is in close proximity to Pasco, for the record shows that it is distant 2.7 miles therefrom, and it also appears that no higher rates were in effect at points between Kennewick and Pasco than those which applied from either of these points. The extension of the rates to Kennewick, therefore, was in strict conformity with Fourth Section Order No. 3700, but the objection is raised that this order is invalid. It appears, however, from the face of this order that an investigation preceded its promulgation. In the opening paragraph, the Commission states that experience has suggested certain modifications in its previous orders, thus necessarily assuming that the Commission had given this matter careful consideration. This order may, therefore, be considered in the light of partial relief extended to the carriers in connection with their previous applications. The relief, it has been held, need not necessarily be confined strictly to that sought by the applications.

> *United States v. Merchants etc. Assn.,* 242 U. S. 178.

Such an order was undoubtedly justified in view of the complexity of the various rate adjustments covered by the many applications on file, and also by the continuing changes in rate situations caused by the extension of new lines of railroad and com-

mercial conditions in general, which are never static but vary continuously from time to time. As we have pointed out, more than 5,000 applications were filed immediately after the amendment of 1910 and the Commission was thus confronted with an enormous task which has not yet been fully completed, as is shown by the annual report of 1922, from which it appears that over 1700 of these applications have not yet been acted upon. Necessarily the Commission in the performance of its administrative duties was obliged to make some temporary provision for readjustments due to changes in the transportation and commercial conditions and this, we submit, was the purpose of the Commission in promulgating Fourth Section Order No. 3700.

That order may be justified upon still another ground:

Prior to the amendment of February 28, 1920, Section 17 of the Interstate Commerce Act provided in part:

> "Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States."

A similar provision with slight changes of phraseology is contained in the amendment of 1920.

No one will dispute that a Fourth Section application is a "proceeding" pending before the Commission and it seems likewise indisputable that Fourth Section Order No. 3700, if it be assumed to be a general order, is one requisite "for the order and regulation" of Fourth Section applications pending before the Commission. This seems to dispose of counsel's objection that the order is invalid because it is general in form. This order is not open to the objection pointed out in the *Sacramento* case, supra, for here the Commission has accorded but temporary relief pending the completion of its investigation of these numerous applications filed in 1910, and it is not in any sense the granting of general relief without investigation.

(*c*) *The Applications Were Filed Within the Time Prescribed by the Amended Fourth Section.*

The act amending the Fourth Section was passed June 18th, 1910. It contained a proviso to the following effect:

> "*Provided further,* that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this Section prior to the expiration of *six months* after the *passage* of this act, nor in any case where application shall have been filed before the Commission, *in accordance with the provisions of this section,* until a determination of

such application by the Commission." (Emphasis ours.)

It is contended by counsel for defendants in error that all applications for relief should have been filed on or before December 18, 1910, to be valid. If we accept this construction, it seems clear that the so-called omnibus applications are not susceptible to the objection that they were not filed within time, since the record shows that they were filed December 10, 1910 (Exhibits C and E) (77).

Objection was made to the application covering Pasco (Exhibit B) upon the ground that it was filed too late, it having been filed with the Commission February 11, 1911.

The statute by which this amendment was effected will be found in *36 U. S. Statutes at Large,* Chap. 309, page 539, *et seq.,* the amendment to the Fourth Section appearing on page 547, being Section 8 of the Act in question. Section 18 of this act appearing on page 557 reads:

> "That this act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to Sections twelve and sixteen which sections shall take effect and be in force immediately."

The act was approved on June 18, 1910.

Sections 12 and 16 have no bearing whatsoever upon the Fourth Section. Therefore, under this

provision of the Statute the act took effect and was in force from and after August 17, 1910, sixty days after the date of approval. Under this construction the carriers were entitled to six months after that date, or until February 17, 1911, within which to file their applications for relief under the Fourth Section.

Such was the interpretation given the act by the Commission in its decision in *Colorado Coal Traffic Association v. C. & S. Ry. Co.,* 19 I. C. C. Rep. 478, where it was held that the six months period began to run August 17, 1910.

In its annual report for the year 1911, at page 20, the Commission said:

> "The amended act was approved June 18, 1910, and was, by its terms, to take effect sixty days from the date of its approval. The Fourth Section provided that no rates or fares in force at the time of the adoption of the amendment should be required to be changed by reason thereof for six months, nor until the application of the carriers for relief, when filed with the Commission, had been acted upon. It was the opinion of the Commission under this phraseology that carriers had until February 17, 1911, in which to file applications for relief from the Fourth Section, and that they were protected by these applications until each application had been investigated and acted upon by the Commission. Nothing could be done until February 17, 1911, since the Statute did not require changes in rates until that date."

At page 17 of its annual report for 1912, the Commission once more expresses the opinion that the period within which applications must be filed expired February 17, 1911. This opinion was reiterated in its report for 1913 at page 25; also in the annual report for 1916, at page 9; also in the annual report for 1917, at page 9.

This opinion, coming, as it does, from the body charged with the administration of this statute, is entitled to great weight. For many years the carriers have rested secure in the belief that the Commission's interpretation of the law was correct, and it seems to us to be highly inequitable at this late date to hold invalid many thousands of applications filed in the utmost good faith by the carriers in reliance upon the Commission's interpretation of the law. For this would be in effect the result of this court's decision, should it hold that the Pasco application was filed too late. Moreover, all of the reasons heretofore urged in support of the weight to be given to the Commission's practical interpretation of the law with respect to the form of the applications, apply with equal force here.

If it be said that there is an irreconcilable conflict between Section 8 of the act to which we have referred (36 Stat. L. Chap. 309) amending the Fourth Section of the Interstate Commerce Act, and Section 18, providing when the act shall take effect,

then Section 18, being the last in order of arrangement, should prevail.

36 Cyc., 1130;
Hall v. Equator Mining & Smelting Co., 11 Fed. Cas. No. 5931;
U. S. v. Jackson, 143 Fed. 783;
U. S. ex rel Harris v. Daniels, 279 Fed. 844.

On the other hand, if it be assumed that there is no such irreconcilable conflict between the two sections to which we have referred, we believe the same result will follow.

The amended Fourth Section relates to the filing of applications within "six months after the passage of this act," and Section 18 of the Act to which we have referred provides that the Act shall "take effect and be in force from and after the expiration of sixty days after its passage," excepting certain sections not material here which are to be in force immediately.

It is our contention that the term *"passage"* as used in the amended Fourth Section relates to the *time when the act takes effect* and not to the time when the act passed both houses of Congress and received the approval of the President. Such a construction has the sanction of authority. In an early case decided in Iowa, it appeared that the right of preemption of land was taken away by an act of January 24, 1857, which repealed all prior

acts allowing a preemption on swamp lands but contained a proviso saving the rights of all actual settlers on the lands at the time of the passage of the act. It was contended that as the petitioner began his improvement in June he was not within the proviso, but the court overruled this objection, saying with respect to the term "passage" that—

> "This, and similar expressions, in statutes, has regular reference to the time of their taking effect. No other construction would be consistent with that requirement of the constitution, which provides that the laws shall be published before they take effect. The defendant's construction would give the same effect, as if it provided for going into force at its passage."

Rogers v. Vass, 6 Iowa (Cole's Ed.) 405.

This case was followed in Idaho where it appeared that the Statute of Limitations had been changed by an act dated January 15, 1875, providing that—

> "When the cause of action has already accrued the party entitled and those claiming under him shall have, after the passage of this act, the whole period herein prescribed within which to commence an action."

The period then allowed by law for commencing an action upon a promissory note, which was the nature of the action in question, was five years. The first section of this act fixed the time when the act took effect as July 1st, 1875. The note was

dated October 31st, 1874, due upon demand, and suit was commenced February 28, 1880. It was contended that the term "passage" meant when the bill was signed by the governor, and that consequently, the suit was filed in time; but the court ruled that the term "passage," as used in the act, had reference to the date when it took effect and that, therefore, plaintiff's claim was barred.

After referring to the section fixing the time when the act became effective, the court said:

> "It will not be contended that one section of an act will take effect or be in force at any earlier date than other sections unless the act itself shall so state. There is no clause in this act providing that this section shall take effect sooner than any other section of the same act. This section, therefore, and no clause of it, can take effect until the first day of July, 1875. The words 'passage of the act,' while they have a technical meaning which is well understood, in this connection and as used in the section referred to, must be held to mean the time when the act takes effect. Any other construction of the words would give life and action to this section before it can have any such life."

Schneider v. Hussey, 2 Idaho 8; 1 Pac. 343.

It will be noted that there is no clause in the amended Fourth Section providing that it shall take effect sooner than any other section, and therefore, following the reasoning of the case last cited,

we must conclude that this section, together with all of the other sections of the same act, except as expressly provided otherwise, became effective August 17, 1910.

The term "passage of the act" was construed to mean its effective date in the following cases:

Harding v. People, 10 Colo. 387; 15 Pac. 727;
State v. Bemis, 45 Nebr. 724, 739; 64 N. W. 348;
Mills v. State Board of Osteopathy, 135 Mich. 525; 98 N. W. 19.

In the case last cited it appeared that the legislature had enacted a statute providing for the examination and registration of osteopaths, with a provision, saying all persons engaged in the practice of osteopathy at the time of the passage of the act, such persons being exempted from its provisions, but they were required, however, to hold a diploma from a regular college of osteopathy. When the act was approved (May 28, 1902) the relator did not have such a diploma but he obtained it on June 25th of that year and held it when the act took effect in September, 1903. The only question involved was whether the term "at the time of the passage of this act" referred to the date when the act was approved or when it took effect. The court held that this meant the time the act takes effect, saying:

> "while an act of the legislature is passed when it is approved by the Governor, the decisions are uniform, so far as we can ascertain, in

holding that the language 'at the time of the passage of this act' means when the act takes effect." (Citing cases.)

The Supreme Court of Kansas adopted this rule, holding that the term "passage of the act" must be construed as the time when it takes effect.

State Ex Rel. Jackson v. Bentley, 80 Kansas 227; 101 Pac. 1073.

This also has been the construction adopted by the Supreme Court of Texas; the syllabus, which clearly defines the point involved, states:

"A statute limiting the time for a prescribed act and giving effect to such limitation, as to existing conditions, from the date of the 'passage' of the law, will be understood as meaning by 'passage' the date when the law goes into effect, unless something appears to indicate a different intent" * * *.

And in the opinion, at page 142, the court says:

"The word 'passage' is used, in connection with legislation, in several senses. The adoption of a measure by either house is spoken of as its passage through that house. The final adoption of a bill by both the house and the senate is commonly spoken of as its passage. Again, after such adoption by the Legislature, the approval of a bill by the Governor is properly called its passage. Where acts take effect from their passage, the time of approval by the Governor, or of final adoption over his veto, or of their becoming laws without his signature

is, in law, called the time of their passage. But where the word is employed in an act which is finally passed at one time to take effect at a later time, it may, by reason of a somewhat common usage, be taken as referring to the latter date, unless such a construction is contrary to the intention appearing from the whole statute. The language of statutes which thus take effect at times subsequent to those of their adoption is usually taken as speaking only when they begin to operate as laws."

Scales v. Marshall, 96 Texas 140; 70 S. W. 945.

4. THE SO-CALLED BRANCH LINE POINTS ARE NOT INTERMEDIATE WITHIN THE MEANING OF THE FOURTH SECTION.

In a previous division of this brief, we have set forth in detail the names and location of these branch line points so it will be unnecessary to repeat them here. It is sufficient to say that they are not on the main line of the Northern Pacific.

The Fourth Section prohibits exacting a greater charge for a shorter than for a longer haul "over the *same* line or route in the *same* direction, the shorter being included within the longer distance." We contend that a point situated upon a branch line is not intermediate within the meaning of the Fourth Section. In fact, the Commission has so held.

Board of Trade of Cheraw v. Seaboard Air Line Ry., 26 I. C. C. Rep. 364, 389;

Berry Coal & Coke Co. v. C. R. I. & P. Ry. Co., 40 I. C. C. Rep. 175;
Mil. El. Ry. etc. Co. v. C. M. & St. P. Ry. Co., 15 I. C. C. Rep. 468.

The inconsistencies to which the construction contended for by defendants in error would lead are shown by the disagreement between counsel and his witness, Mr. Knox. The latter, while upon the witness stand, stated that he would go out on the branch line far enough so that his mileage on the branch line plus the mileage from the junction point to destination equalled the mileage from the point of origin to the point of destination (90). To show how this would operate, let us assume that it is 300 miles from Portland to Kennewick, and let it be further assumed that at a point midway between the two, that is to say, 150 miles from Portland, a branch extended southward for a distance of 300 miles. Under this theory rates upon the branch for a distance of 150 miles south of the junction point (this being 300 miles from Portland or the same distance as Kennewick) would be in violation of the Fourth Section, but as to all points further south the rates would not violate the Fourth Section. On the one hand, counsel for defendants in error takes the position that if the sum of the rates, say from Portland to the junction point, and the local rate on the branch, exceeds the rates to Kennewick, the extent of the violation under Fourth Section is measured by the difference

between these two rates. On the other hand, Mr. Knox urges mileage as a measure of the violation, while his counsel would use the combination of rates, which may be made in utter disregard of mileage. The only way to avoid these inconsistencies and practical difficulties of arriving at a proper measure of the rate is to hold that the Fourth Section has application only to main line points which are *directly* intermediate to the more distant point at which a lower rate exists, and such, we contend, is the proper interpretation to be given the statute, particularly in view of the interpretation put upon it by the Interstate Commerce Commission, which is entitled to the most weighty consideration.

CONCLUSION

It is therefore respectfully submitted,

First, That regardless of whether or not the Fourth Section departures were protected by applications filed with the Interstate Commerce Commission, the plaintiffs neither alleged nor proved a case because there was no allegation or proof of damage aside from the proof that plaintiffs, or their assignors, paid higher rates from the intermediate points than applied to the further distant point;

Second, That the court below was without jurisdiction of the subject matter of the action, the Interstate Commerce Commission having exclusive jurisdiction thereof;

Third, That any existing Fourth Section departures were protected by applications duly filed with the Interstate Commerce Commission; and

Fourth, That as to shipments moving from branch line points, the long and short haul provision of the Fourth Section of the Interstate Commerce Act is not applicable.

It is therefore respectfully submitted that the judgments of the lower court should be reversed and the actions dismissed.

Dated: San Francisco, California,
May 1st, 1924.

HENLEY C. BOOTH,
JAMES E. LYONS,
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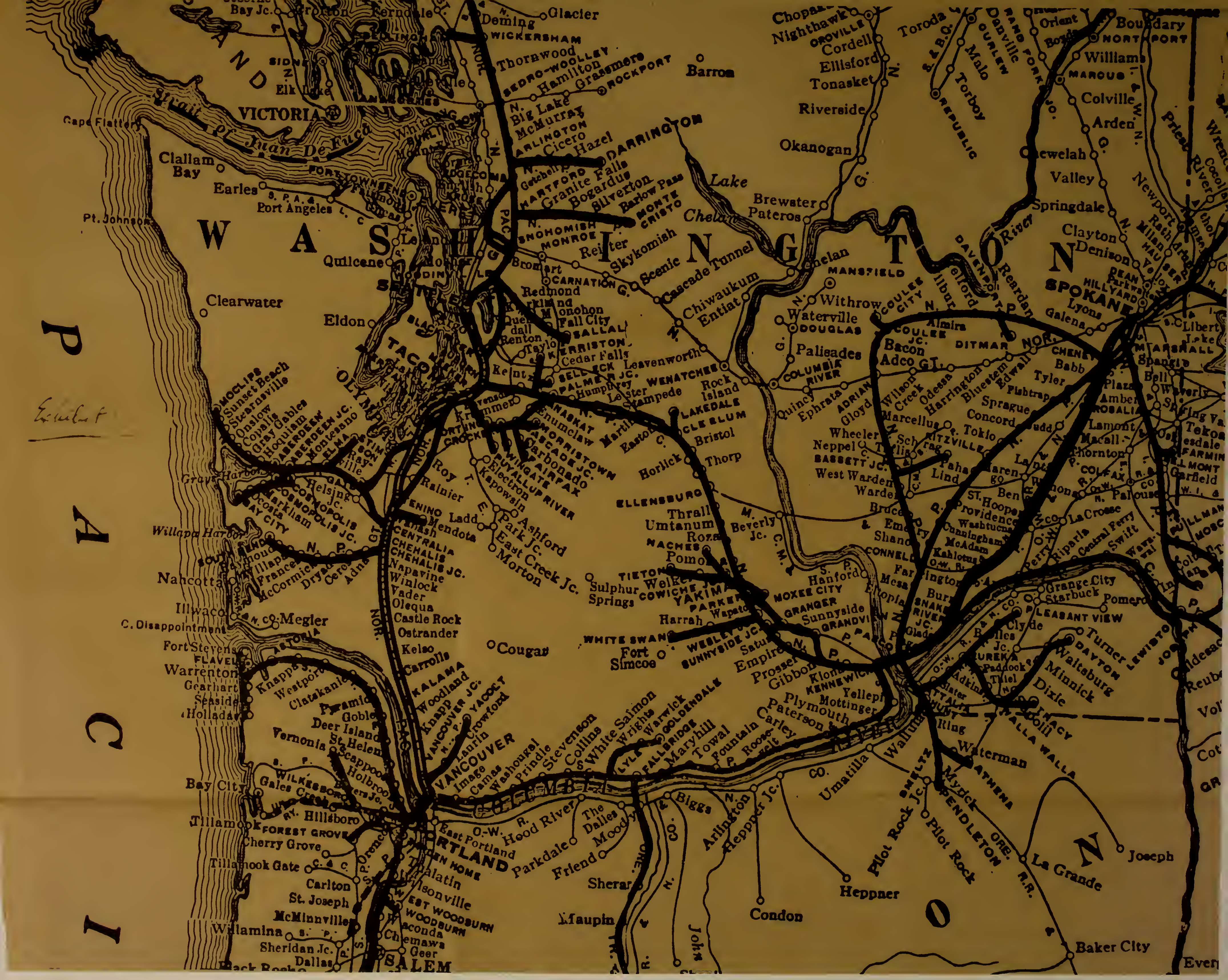
65 Market St., San Francisco, Cal.,
Attorneys for Plaintiffs in Error.



WASHINGTON
OREGON
PACIFIC
Strait of Juan De Fuca
VICTORIA
Glacier
Deming
WICKERSHAM
Thornwood
SEDRO-WOOLLEY
Hamilton
Grassmere
ROCKPORT
Barron
Big Lake
McMurray
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DARRINGTON
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Earles
Port Angeles
PORT TOWNSEND
Pt. Johnson
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TACOMA
OLYMPIA
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Bogardus
Silverton
Barlow Pass
MONTE CRISTO
SNOHOMISH
MONROE
Skykomish
Scenic
Cascade Tunnel
Chiwaukum
Entiat
Lake
Chelan
Brewster
Pateros
Okanogan
Riverside
Tonasket
Ellisford
Cordell
OROVILLE
Nighthawk
Toroda
Danville
Malo
Torboy
REPUBLIC
Orient
Boundary
NORTHPORT
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MARCUS
Colville
Arden
Chewelah
Valley
Springdale
Clayton
Denison
Newport
Priest River
SPOKANE
HILLYARD
Lyons
Galena
Redmond
CARNATION
Fall City
Cedar Falls
Leavenworth
WENATCHEE
Rock Island
Stampede
LAKEDALE
CLE ELUM
Bristol
Thorp
Horlick
ELLENSBURG
Thrall
Umtanum
NACHES
Pomona
TIETON
Sulphur Springs
COWICHE
YAKIMA
PARKER
Wapato
Harrah
WHITE SWAN
Fort Simcoe
MOXEE CITY
GRANGER
Sunnyside
GRANDVIEW
Prosser
Gibbon
KENNEWICK
Hanford
Mesa
Beverly Jc.
MANSFIELD
Withrow
Waterville
DOUGLAS
Palisades
COLUMBIA RIVER
Quincy
Ephrata
Wheeler
Neppel
BASSETT JC.
West Warden
Warden
COULEE CITY
Almira
Bacon
Adco
DITMAR
Odessa
Harrington
Edwall
Sprague
Concord
Tokio
RITZVILLE
Lind
Providence
Washtucna
Cunningham
McAdam
Kahlotus
CHENEY
Babb
Tyler
Lamont
Thornton
COLFAX
Palouse
LaCrosse
Riparia
Central Ferry
Pomeroy
Grange City
Starbuck
PLEASANT VIEW
Turner
DAYTON
Waltsburg
Minnick
Dixie
WALLA WALLA
Wallula
Waterman
ATHENA
PENDLETON
Pilot Rock
Umatilla
Heppner
Condon
Arlington
Biggs
Towal
Maryhill
GOLDENDALE
Wrights
White Salmon
LYLE
Stevenson
Collins
Prindle
Washougal
Camas
VANCOUVER
Kelso
Castle Rock
Ostrander
Olequa
Vader
Winlock
Napavine
CHEHALIS
CENTRALIA
Mendota
Ladd
Ashford
Park Jc.
Morton
East Creek Jc.
Cougar
Kapowsin
Electron
PUYALLUP RIVER
Carbonado
Roy
Rainier
Tenino
MORRISTOWN
Enumclaw
Buckley
Hoquiam
ABERDEEN
Montesano
ELMA
Gray's Harbor
Cosmopolis
Willapa Harbor
Nahcotta
Ilwaco
C. Disappointment
Megler
ASTORIA
Fort Stevens
FLAVEL
Warrenton
Gearhart
Seaside
Holladay
Knappa
Westport
Clatskanie
Goble
Deer Island
St. Helens
Vernonia
Scappoose
Bay City
Tillamook
FOREST GROVE
Cherry Grove
Tillamook Gate
Carlton
St. Joseph
McMinnville
Willamina
Sheridan Jc.
Dallas
SALEM
Chemawa
Gervais
WOODBURN
Hillsboro
PORTLAND
East Portland
Hood River
The Dalles
Moody
Parkdale
Friend
Sherar
Maupin
La Grande
Joseph
Baker City
Lewiston
Clyde
Adkins

"Exhibit 2" (continued)

(Copy)

PACIFIC FREIGHT TARIFF BUREAU

San Francisco, Cal.

FORM A

Feb. 11, 1911.

PETITION No. 2

To the INTERSTATE COMMERCE COMMISSION,
Washington, D. C.

APPLICATION FOR RELIEF FROM PROVISIONS OF FOURTH SECTION OF AMENDED COMMERCE ACT FOR ACCOUNT OF TARIFF No. 1-A, I. C. C. No. 62, of F. W. GOMPH, Agent.

In the name and on behalf of each of the carriers parties to the Tariff above named, the undersigned, acting as Agent and Attorney, or under authority of concurrences on file with the Commission from each of the said carriers, respectfully petitions the Interstate Commerce Commission for authority to continue all rates in above named Tariff, between San Francisco, Oakland, San Jose, Stockton, Marysville, Los Angeles, Cal., and other points in California named in said Tariff, *and* Pasco, Wash., lower than the rates to points on the Northern Pacific Railway, intermediate to Pasco, Wash.

This application is based upon the desire of the Northern Pacific Railway to meet by direct haul over a longer line or route competitive conditions created at points directly competitive with Pasco, Wash., such as Wallula and Hunts Junction, Wash., by the Oregon-Washington Railroad and Navigation Co.

It is not practicable in this petition to state the rates in detail nor to specify the highest charge at intermediate points, nor the extent to which rates at the intermediate points exceed the rates at the more distant points named above.

F. W. GOMPH, Agent.

Subscribed and sworn to before me this 11th day of February, 1911,

H. T. SIME,

Notary Public in and for the City and County of San Francisco, Calif.

"Exhibit 3"

The Commission being of the opinion that the convenience of the carriers, the public, and the Commission will be better served by assembling in one general fourth section order, divided into numbered sections for convenient tariff reference, the general fourth section orders known as Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, and experience having suggested certain modifications in the descriptions of conditions under which relief has been afforded by these orders, and certain additional situations as to which carriers may be relieved from the operation of said section, therefore,

"It is ordered, That Fourth Section Order No. 100, General No. 2; Fourth Section Order No. 485, General No. 9; Fourth Section Order No. 839, General No. 11; and Fourth Section Order No. 2200, General No. 12, be, and the same are hereby, vacated and set aside as of March 15, 1914.

"It is further ordered, That effective March 15, 1914, as to and confined in all cases to rates and fares which are included in and covered by applications for relief from the provisions of the fourth section of the act to regulate commerce that were filed with the Commission on or before February 17th, 1911, and until the applications including and covering such rates or fares have been passed on by the Commission, carriers may file with the Commission, in the manner and form prescribed by law and by the Commission's regulations, such changes in rates and fares as occur in the ordinary course of their business, continuing higher rates or fares at intermediate points, and through rates or fares higher than the combinations of intermediate rates or fares, provided that in so doing the discrimination against intermediate points is not thereby increased.

"It is further ordered, That as to and confined in all cases to rates which are included in and covered by applications as above described, carriers may file with the Commission in the manner and form prescribed by law and by the Commission's regulations, changes in rates under the following conditions, although the discrimination against intermediate points is thereby increased:

"Section 1. A through rate which is in excess of the aggregate of the intermediate rates lawfully published and filed with the Commission may be reduced to equal the sum of the intermediate rates.

"Sec. 2. Where a through rate has been, or is hereafter, reduced under the authority of section 1 of this order, carriers maintaining through rates via other routes between the same points may post the rate so made by the route initiating the reduction.

"Sec. 3. Where a reduction is made in the rate between two points under the authority of section 1 of this order, such reduction may extend to all points in the group which take the same rates as does the point from or to which the rate has been reduced.

"Sec. 4. Where through rates are in effect which exceed the lowest combination of rates lawfully published and filed with the Commission, carriers may correct said through rates by reducing the same to equal such lowest combination.

"Sec. 5. A larger line or route may reduce the rates in effect between the same points or groups of points to meet the rates of a shorter line or route when the present rates via either line do not conform to the fourth section of the act, under the following circumstances:

(a) Where the longer line is meeting a reduction in rates initiated by the shorter line.

(b) Where the longer line has not at any time heretofore met the rates of the shorter line.

"Sec. 6. A newly constructed line publishing rates from and to its junction points under the authority contained in paragraph (b) of Section 5, may establish from and to its local stations rates in harmony with those established from and to junction points.

"Sec. 7. Carriers whose rates between certain points do not conform to the fourth section of the act, which rates have been made lower than rates at intermediate points to meet the competition of water or rail-and-water carriers between the same points, may make such further reductions in rates as may be required to continue to effectively meet the competition of rail-and-water or all-water lines.

"Sec. 8. Where rates are in effect from or to a point that are lower than rates effective from or to intermediate points, carriers may extend the application of such rates to, or establish rates made with relation thereto at, points on the same line adjacent or in close proximity thereto, provided that no higher rates are maintained from and to points intermediate to the former point and the new point to which the application of the same or relative rates has been extended.

"Sec. 9. Where there is a rate on a commodity from or to one or more points in an established group of points from and to which rates are ordinarily the same, but the rate on the said commodity does not apply at all points in the said group, such rate may be made applicable to or from all of such other points.

"Sec. 10. Where there is a definite and fixed relation between the rates from and to adjacent or contiguous groups of points, and the rates to or from one of said groups are changed, corresponding changes may be made in the rates of the other groups to preserve such relation.

"Sec. 11. In cases where no through rates are in effect via the various routes or gateways between two points, and the combination of lawfully published and filed rates via one gateway makes less than the combination via the other gateway, a through rate may be established on the basis of the combination via the gateway over which the lowest combination can be made. and made applicable via all gateways.

"Sec. 12. In cases where through rates are in effect between two points, via one or more routes or gateways, which are higher than the combination of lawfully published and filed rates via one of these gateways, different carload minima being used on opposite sides of the gateway, a through rate may be established equal to the lowest combination of lawfully published and filed rates, using the higher of the carload minima but continuing the present higher through rate if based upon a lower carload minimum.

"The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the act.

"And it is further ordered, That when the Commission passes upon any application for relief from the provisions of the fourth section with respect to the rates referred to herein, the order issued with relation thereto will automatically cancel the authority herein granted as to the rates covered and affected by such order."

"Exhibit 4"

SUPREME COURT OF THE UNITED STATES

Nos. 114, 122, 123, 209—October Term 1923

James C. Davis, as Agent, etc., 114 Petitioner, vs. The Portland Seed Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
The San Francisco and Portland Steamship Company, 122 Plaintiff in Error, vs. A. J. Parrington.	In Error to the United States Circuit Court of Appeals for the Ninth Circuit.
James C. Davis, Agent, United States Railroad Administration, 123 Plaintiff in Error, vs. A. J. Parrington.	
Great Northern Railway Company, 209 Petitioner, vs. McCaull-Dinsmore Company.	On Writ of Certiorari to the Supreme Court of Minnesota.

(April 7, 1924.)

Mr. Justice McReynolds delivered the opinion of the Court.

The courts below affirmed judgments for the plaintiffs in four separate actions brought to recover alleged overcharges on freight said to have been demanded by the respective carriers in violation of the long and short haul clause, Fourth Section, Interstate Commerce Act. c. 104, 24 Stat. 379, 380; c. 309, 36 Stat. 539, 547; c. 91, 41 Stat. 456, 480, which declares:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater com-

pensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance; Provided, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section (The Transportation Act, 1920, added); but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed.'' * * *

All the cases involve the same fundamental question of law. The essential charge is that the carrier demanded and received greater compensation for transporting freight for a shorter distance than its published rate for transporting like property for a longer distance over the same route and in the same direction.

It will suffice to state that the salient facts and issues disclosed by record No. 114—Davis, Agent, v. The Portland Seed Company. They are typical.

Pecos is in Western Texas, 160 miles south of Roswell, N. M. A line of the Atchison, Topeka & Santa Fe Ry. System joins these points and extends northward to Denver, Colo., where it connects with the Union Pacific system which leads into the Northwest. January 4, 1919, the carrier received a car of alfalfa seed at Roswell for transportation to Walla Walla, Wash., by way of Denver. Three weeks later respondent Port-

land Seed Company received this car at destination and paid freight charges reckoned at $2.44 per hundred pounds—the scheduled rate from Roswell. During all of January, 1919, the initial carrier's published schedule specified $1.515 per hundred pounds as the rate for transporting alfalfa seed from Pecos to Walla Walla through Roswell and Denver; and no application had been made to the Interstate Commerce Commission for permission to charge less for the longer than for the shorter haul. The Seed Company demanded judgment for the excess above the Pecos rate, as an overcharge illegally exacted and recoverable as money had and received.

The insistence is that under the long and short haul clause the lower published rate from Pecos became the maximum which the carrier could charge for the shipment from Roswell, notwithstanding the higher published rate therefor; that the sum charged above the Pecos rate amounted to an illegal exaction, recoverable without other proof of actual damage and without regard to the intrinsic reasonableness of either rate.

Relying on Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, the Interstate Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, section 4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. Nix & Co. v. Southern Ry. Co., (1914) 31 I. C. C. 145; S. J. Greenbaum Co. v. Southern Ry., 38 I. C. C. 715; Chattanooga Implement & Mfg. Co. v. Louisivlle & Nashville R. R. Co., 40 I. C. C. 146; LeCrosse Shippers' Asso. v. C. I. & L. Ry. Co., 43 I. C. C. 520; Oregon Fruit Co. v. Southern Pacific Co., 50 I. C. C. 719; Item Biscuit Co. v. C. B. & Q. R. R. Co., 53 I. C. C. 729; Illinois Brick Co. v. Director General (1920), 57 I. C. C. 320, 323.

Counsel insist that under section 4 it was unlawful to charge compensation above the published Pecos rate for the transportation from Roswell to Walla Walla. Therefore, the published Roswell rate being unlawful, non-existent indeed, the Pecos rate became the only one in force. United States v. Louisville & Nashville R. R. Co., 235 U. S. 314, 323, is relied upon; and it is said that the opinion there interprets the long and short haul clause as "absolutely prohibiting the existence" of higher rates for shorter hauls unless approved by the Commission. Read with the real issue in mind, the opinion gives no support to respondent's argument. The Interstate Commerce Commission held that certain reshipping privileges granted to Nashville but refused to Atlanta amounted to unreasonable preference under section 3 and ordered the carrier to discontinue them. The Commerce Court restrained the enforcement of this order. This Court declared that the challenged privileges were prohibited by the long and short haul clause; that section 4 controlled the right to grant them; that they had not been authorized by the Commission; and therefore it would be unlawful to continue them. Accordingly, the order to desist was approved and the decree of the Commerce Court reversed. No disagreement with Pennsylvania R. R. Co. v. International Coal Co., was suggested. The Court said:

(322-3) "The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of section 4 of the Act to Regulate Commerce and the right to make a rate accordingly to continue in force until on complaint it was corrected in the manner pointed out by statute ceased to exist after the adoption of the amendment to section 4 by the Act of June 18, 1910, c. 309, 36 Stat. 539, 547. This results from the fact that by the amendment in question the original power to determine the existence of the conditions justifying

the greater charge for a shorter than was exacted for a longer distance, was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibition efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. Intermountain Rate Cases, 234 U. S. 476. If then it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by section 4 of the Act, as there is no pretense that permission for its continuance had been applied for as required by the amendment and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below."

The opinion does not discuss the carrier's liability to shippers who had paid higher rates for the shorter hauls. No doubt similar relief would have been granted by the Commission if the situation here revealed had been brought before it.

Respondent has not asked an injunction against illegal rates. It seeks to secure something for itself without proof of pecuniary loss consequent upon the unlawful act. A similar effort failed in Pennsylvania R. R. Co. v. International Coal Co., supra. The International Company shipped 40,000 tons of coal from the Clearfield district, paying full schedule rates. The carrier had allowed other shippers from and to the same places at the same time rebates ranging from five to thirty-five cents per ton. Without alleging or proving pecuniary injury resulting to itself from this unlawful action, the Company sought to recover like concessions upon all its shipments. Through Mr. Justice Lamar, this Court said:

(196-7) "The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper * * * The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

(200) "Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in Parsons v. Chicago & N. W. Railway, 167 U. S. 447, 460, construing this section (8), 'before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the Act of June 18, 1910 (36 Stat. 539, c. 309), provided that where a carrier misquotes a rate it should pay a penalty of $250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910), 7569. The danger that payment of damages for violations of the law might be used as a means of

paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418-421, 423; 14 I. C. C. 82."

(200) "It is said, however, that it is impossible to prove the damages occasioned one shipper by the payment of rebates to another; and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy but deprives the plaintiff of a right it had at common law to recover this difference between the lawful and the unlawful rate."

(200-1) "We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any right of action for any sort of damages in a case like this, while this statute does give a clear, definite and positive right to recover for unjust discrimination."

(201-2) "Union Pacific R. R. v. Goodridge, 149 U. S. 680, 709, involved the construction of the Colorado statute, which did not, as does the Commerce Act, compel the carrier to adhere to published rates, but required the railroad to make the same concessions and drawbacks to all persons alike, and for a failure to do so made the carrier liable for three times the actual damage sustained or overcharges paid by the party aggrieved. This distinction is also to be noted in the English cases cited. The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion and might be recovered in an action at law as for an overcharge. Denaby v. Manchester Ry., L. R. 11 App. Cases, 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did

not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion."

(202-203) "Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But, under sec. 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because sec. 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be '*liable to the person injured thereby for the full amount of damages sustained in consequence of such violation * * * together with reasonable attorney's fee*'."

(206) "To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable

for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the Act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evildoers. But for the public wrong and for interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be and whether greater or less than the rate of rebate paid."

Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531, presents no conflict with Pennsylvania R. R. v. International Coal Co. There the shipper paid a published rate which the Commission afterwards found to be unreasonable. This Court held he could recover, as the proximate damage of the unlawful demand, the excess above the rate which the Commission had declared to be reasonable. The opinion went no further. Certainly it did not suggest that the unreasonable rate was nonexistent for any purpose because forbidden by law.

Section 6 of the Commerce Act directs—

"(1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad,

by pipe line, or by water when a through route and joint rate have been established. * * * (3) No change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission. * * * Provided, that the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified. * * * (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined by this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportaion of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

"Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier, shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"Sec. 10 (1) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who, alone or with any other corporation, company, person or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this Act required to be done; or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this Act to be done or not to be done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense; Provided, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

What liability did the carrier incur by publishing a rate from Pecos lower than the scheduled one from Roswell without the Commission's permission, and thereafter imposing and collecting the higher rate upon the shipment to Walla Walla?

Construing the words of section 4 literally, it is argued that unless some property moved over the longer distance at the lower rate before greater compensation was charged for transporting like property over a shorter one, there was no violation of law. We cannot accept this view. It does not accord proper

weight to imperative requirements concerning publication of rates and subsequent observance of them. The Commission holds, for example, that although the schedule contains a plain clerical error, nevertheless, no other charge may be demanded and the shipper may recover any excess. Lamb-Fish Lumber Co. v. Y. & M. V. R. R. Co., 42 I. C. C. 470.

The record shows, we think, that the carrier violated the statute by publishing the lower rate for the longer haul without permission, and, prima facie at least, incurred the penalties of section 10. Also, it became "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of * * * such violation," together with reasonable counsel fees, as provided by section 8. But mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either.

With special knowledge of rate schedules and relying on Pennsylvania R. R. Co. v. International Coal Company, the Interstate Commerce Commission for ten years has required proof of financial loss as a prerequisite to reparation for infractions of the Fourth Section. The rule is firmly established. Congress has not shown disapproval. The Transportation Act, 1920, with evident purpose to conserve the carriers' revenues, added the following to the proviso which gives power to exexempt from the long and short haul clause: "But in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed." The rule adopted by the Commission follows the logic of the opinion relied upon and can be readily applied. The contrary view would not harmonize with other provisions of the Act; and, put into practice, would produce unfortunate consequences.

The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified. It commanded adherence to the published rate from Roswell; section 6 forbade any other charge. Observance of the lower rate from Pecos, put in without authorization, might have been forbidden, as pointed out in United States v. Louisville & Nashville R. R. Co., supra; but it would be going too far to hold, as respondent insists, that the unauthorized publication established the lower rate as the maximum permissible charge from the intermediate point—the only rate therefrom which could be demanded.

If a lower rate published without authority becomes the maximum which may be charged from any intermediate point, mistakes in schedules (and they are inevitable) may become disastrous. Suppose the rate from an obscure point in Maine to San Francisco via Boston, New York and Chicago should be printed at $15.00, instead of $150, and the error remain undiscovered for many months, could all who had paid more than $15.00 for passage along that route recover the excess without proof of pecuniary loss?

After the challenged judgments were entered, Kansas City Southern Ry. v. Wolf, 261 U. S. 133, was decided. We adhere to the ruling there announced, and in view of it defenses in these causes based upon prescribed limitations must be determined.

The judgments below are reversed. The causes will be remanded with appropriate instructions for further proceedings.

Mr. Justice Brandeis dissents.

A True Copy.

Test:

Clerk, Supreme Court, U. S.